

# Software End User License Agreement

This End User License Agreement (the „Agreement“) is made between PTW Freiburg GmbH ("PTW") and the user ("Licensee") of software developed and distributed by PTW (the "Software"). By downloading and/or installing the Software, this Agreement comes into force and Licensee will be subject to the terms and conditions of this Agreement.

## § 1 Definitions

The following definitions shall apply:

**"Documentation"** means the documentation accompanying the Software provided by PTW.

**"Licensed Product"** comprises the object code of the Software and the Documentation, as well as any updates, upgrades, and new releases to the same which PTW may provide to Licensee in fulfillment of its maintenance and support obligations hereunder. The source code of the Software is not part of this Agreement.

**"Purchase Document"** means the applicable offer, order confirmation or any other purchase document provided by PTW.

**"Purpose of Use"** means the purposes and scope described in the Documentation (there called "intended use"), limited to uses in connection with radiation therapy planning and delivery, as patient quality assurance, treatment plan adaptation, machine quality assurance, machine commissioning and services for the Licensee.

**"Software"** means the software developed and distributed by PTW, into which Third-party components may be incorporated.

**"Third-party"** means a legally independent party from PTW.

**"Third-party component"** means a software module incorporated in the Software of this Agreement owned by a third-party.

## **§ 2 Scope of this Agreement**

- (1) PTW has agreed with Licensee to grant Licensee a license to use and exploit the Licensed Product subject to the terms and conditions of this Agreement.
- (2) PTW may be the holder of a distribution license from the owner of Third-party components, which are incorporated into the Software. In such case, PTW is authorised to grant use of the Software in total under the conditions set forth in § 3.

## **§ 3 Grant of Rights**

- (1) PTW hereby grants to Licensee the non-exclusive, non- sublicensable and non-transferable right to use, to copy, to revise and to decompile the Licensed Product without limitation in time, manner or place subject to the terms of this Agreement.
- (2) Paragraph 1 applies to licensees who have concluded a distribution agreement with PTW with the proviso that there is a right of one-time resale. In the event of resale, the Licensee loses its right of use.
- (3) The right to use and exploit is limited to the Purpose of Use.
- (4) Licensee shall only be entitled to reproduce, revise or decompile the Licensed Product if this is permitted by law and only if the information required for this purpose is not made available by PTW at Licensee's request.
- (5) Except as expressly set forth herein, no right, title or interest in, or license to, any Intellectual Property Right or product of either party or Third-Party is granted or conveyed to the Licensee. Especially, no more extensive rights to use and exploit the Licensed Products are granted to Licensee as expressly set forth herein.
- (6) The Licensee will not use the Licensed Product in any unlawful or illegal manner.
- (7) Licensee undertakes to allow PTW or an agent of PTW to audit whether Licensee's use of the Licensed Product is consistent with the rights granted to Licensee herein upon request by PTW and provided there is a legitimate interest therein and to give full co-operation to PTW or its agent carrying out such audit.

## **§ 4 Delivery and Installation of the Licensed Product**

- (1) PTW shall deliver the necessary number of copies of the Licensed Product for the exercise of the rights to use and exploit granted to Licensee herein in machine readable form at its option either stored on a type of data storage media in common use at the time or transferred by remote data transfer. Licensee shall receive the Documentation as electronic document in English and one copy of the user manual per copy of the Software as electronic document in English. The parties agree PTW's registered office as the place of performance for the delivery of the Licensed Product. Licensee shall bear all costs and risks related to such delivery. Upon transfer of the Licensed Product, the risk of transportation (particularly the risk of accidental loss or destruction) of the copies of the Licensed Product passes to Licensee.
- (2) Licensee is responsible for providing the system environment in accordance with the system requirements set forth in the Documentation.

- (3) The Software shall be installed by Licensee for Licensee's use only at the locations which are described in the Purchase Order and at such alternate or additional locations as PTW may authorize from time to time in writing upon Licensee's prior written request. This shall also apply to any later change of installation locations. An installation and briefing by PTW in situ are subject to an additional fee.
- (4) Licensee is aware that the use of the Software is limited to the scope as set forth in the Purchase Document and the Documentation. Further licenses are subject to an additional fee.
- (5) All copies of the Licensed Product shall remain in the sole ownership of PTW until the complete payment of the license fees. Upon breach of contract by Licensee, in particular on default of payment, PTW shall be entitled to require at Licensee's expense the return of all copies of the Licensed Product in which PTW has retained ownership, or if applicable, to demand the assignment of Licensee's right of return against third parties. In such case upon PTW's request Licensee shall confirm in writing that no copies of the Licensed Product were retained and that all installations of the Licensed Product have been irrevocably deleted from Licensee's or third party's systems. Before the unconditional transfer of ownership, Licensee shall only dispose of rights in the Licensed Product with the written consent of PTW.

## § 5 Licence Fees

- (1) The license fee depends on the customer-specific configuration, the license model and the term of the respective license agreement. The license fee is exclusive of any value added tax and other applicable sales taxes, local taxes, duties, and fees which may be applicable.
- (2) License fees shall be payable by Licensee within the payment period stated in the corresponding invoice.

## § 6 Rights in Case of Defects

- (1) The Software provided by PTW shall be substantially in accordance with the product description. Rights in case of defects shall be excluded in the case of minor or immaterial deviations from the agreed or assumed characteristics or in the case of just slight impairment of use. Product descriptions shall not be deemed guaranteed unless separately agreed in writing. In respect of updates, upgrades and the delivery of new versions, Licensee's rights in case of defects shall be limited to the new features of the update, upgrade or new version compared to the previous version release.
- (2) If Licensee demands replacement because of a defect, PTW has the right to choose between the improvement, replacement delivery or replacement of services. If the defect is not cured within a first time limit and Licensee has set PTW a reasonable second time limit without success, then Licensee may, subject to the statutory prerequisites, at its option withdraw from this Agreement or reduce the price and claim damages or reimbursement of costs.
- (3) The remedying of the defect may also take place through the delivery or installation of a new program version or a work-around. If the defect does not or not substantially impair the functionality, then PTW is entitled, to the exclusion of further rights in case of defects, to remedy the defect by delivering a new version or an update as part of its version.
- (4) The Licensee is obliged to take over a new software version if the contractual scope of functions is maintained. The Licensee's rights according to § 439 Bürgerliches Gesetzbuch (German Civil Code) remain unaffected.

- (5) Defects must be notified in writing with a comprehensible description of the error symptoms, as far as possible evidenced by written recordings, hard copies or other documents demonstrating the defects. The notification of the defect should enable the reproduction of the error. This shall not affect the statutory obligation of Licensee to inspect and notify defects.
- (6) The Licensee's rights in case of defects are limited to 12 months and the period shall begin on the date of delivery of the first copies of the Software including Documentation. In respect of the delivery of updates, upgrades and new versions, the period for such deliverables shall in each case begin on the date of delivery. The limitation of claims for damages of the Licensee shall be determined with the provisions of § 8.
- (7) Licensee shall inspect the delivered items without delay for any transport damage and other apparent defects preserve the appropriate evidence and assign any claims for recourse to PTW while handing over the documents.
- (8) Any claims for damages are subject to the limitations set forth under § 8.
- (9) If the defect is caused by the defective products of a supplier and the supplier does not act as an assistant in performance of PTW, rather PTW is merely passing on a third party product to Licensee, then Licensee's rights in case of defects shall at first hand be limited to the assignment of PTW's rights in case of defects against its supplier. This shall not apply, when the defect is caused by improper handling of the supplier's product for which PTW is responsible. If Licensee is unable to assert his rights in case of defects against the supplier out of court, PTW's subsidiary liability for Licensee's rights in case of defects shall remain unaffected.
- (10) Amendments or additions to the services or items delivered which Licensee carries out itself or through third parties, shall cause Licensee's rights in case of defects to be cancelled, unless Licensee proves that the amendment or addition did not cause the defect. PTW shall also not be responsible for defects, which are caused by improper use or improper operation or the use of unsuitable means of operation by Licensee.
- (11) PTW may refuse to remedy defects or deliver replacements, until Licensee has paid the agreed fees to PTW, less an amount which corresponds to the economic value of the defect.

## § 7 Rights in Case of Defects in Title

- (1) The Software delivered or provided by PTW shall be free from third party rights, which prevent the use in accordance with the contract. Excepted from this are customary retentions of title. The absence of defects of title shall not be deemed guaranteed unless separately agreed in writing.
- (2) If third parties are entitled to such rights and they pursue these, then PTW shall do everything in its power, in order to defend the Software at its own expense against the third party rights claimed. Licensee shall inform PTW in writing without delay of the claiming of such rights by third parties and shall give Licensor all powers of attorney and authorisations which are necessary in order to defend the Software against the third party rights claimed.
- (3) To the extent that there are defects in title, PTW is (a) entitled at its option to either (i) take legitimate measures to remove the third party rights, which impair the contractual use of the Software, or (ii) remedy the enforcement of such claims, or (iii) change or replace the Software in such a manner, that it no longer infringes the rights of third parties, provided and to the extent that this does not substantially impair the warranted functionality of the Software, and (b) under an obligation to reimburse Licensee for its necessary refundable costs incurred in the enforcement of legal claims, insofar as these are not based on the Licensee's conduct in breach of duty.

- (4) If a release under para. (3) within a reasonable time limit set by Licensee, then Licensee may subject to the statutory prerequisites at its option withdraw from this Agreement or reduce of the price and claim damages.
- (5) In all other respects § 6 para. (4), (6), (8) and (11) apply accordingly.

## **§ 8 Liability, Damages**

- (1) PTW shall be liable under the terms of this Agreement only in accordance with the provisions set out under (a) to (e):
- (a) PTW shall be unrestricted liable for losses caused intentionally or with gross negligence by PTW, its legal representatives or senior executives and for losses caused intentionally by other assistants in performance; in respect of gross negligence of other assistants in performance PTW's liability shall be as set forth in the provisions for simple negligence in (e) below.
  - (b) PTW shall be unrestricted liable for death, personal injury or damage to health caused by the intent or negligence of PTW, its legal representatives or assistants in performance.
  - (c) PTW shall be liable for losses arising from the lack of any warranted characteristics up to the amount which is covered by the purpose of the warranty and which was foreseeable for PTW at the time the warranty was given.
  - (d) PTW shall be liable in accordance with the Produkthaftungsgesetz (German Product Liability Act) in the event of product liability.
  - (e) PTW shall be liable for losses caused by the breach of its primary obligations by PTW, its legal representatives or assistants in performance. Primary obligations are such basic duties which form the essence of the Agreement, which were decisive for the conclusion of the Agreement and on the performance of which Licensee may rely. If PTW breaches its primary obligations through simple negligence, then its ensuing liability shall be limited to the amount which was foreseeable by PTW at the time the respective service was performed.
- (2) PTW shall be liable for loss of data only up to the amount of typical recovery costs which would have arisen had proper and regular data backup measures been taken.
- (3) Any more extensive liability of PTW is excluded on the merits.
- (4) In the above cases the statutory period of limitation shall apply.

## **§ 9 Third party components**

- (1) The Licensee is not allowed to use Third-party components independently of the Software, especially the Licensee is not allowed to use such components with any other software.
- (2) A Third-party component is Copyright ©2011, Massachusetts Institute of Technology ("MIT"). All Rights Reserved.

## **§ 10 Confidentiality**

- (1) Information exchanged under contract negotiations or under this Agreement shall be considered confidential if it is received by the disclosure of which has been identified as confidential or if the circumstances of disclosure can reasonably indicate confidential treatment.
- (2) This obligation is unlimited in time.
- (3) Confidential Information may only be used for the purpose of performing obligations or exercising rights under this agreement and may only be disclosed to those employees, agents or freelancers who need to know such information. These persons were also bound in writing to secrecy.
- (4) Confidential Information is protected with reasonable care to prevent unauthorized use or disclosure during the period in which the information is kept confidential or trade secret will be. These obligations do not apply to information that (a) was or will become known to the receiving party without a confidentiality obligation; (b) was developed independently by the receiving party; or (c) must be disclosed by law or by order of a governmental authority.

## **§ 11 Data protection**

- (1) The Parties shall comply with the rules on data protection, especially the provisions of the General Data Protection Regulation and the German Federal Data Protection Act. They shall ensure that their employees also comply with these provisions, in particular oblige them to observe data secrecy before taking up their duties.
- (2) PTW processes personal data of the Licensee and of employees of the Licensee only to the extent necessary for the execution of this Agreement. The Licensee shall ensure that its employees have been informed to the necessary extent about the data processing and have consented to this processing or that consent is not required.
- (3) Personal data will not be passed on to third parties.
- (4) If access by PTW to personal data in the course of error search and error correction cannot be excluded (in particular if PTW is granted access to the Licensee's company and/or hardware and software), the Licensee shall conclude a separate Data Processing Agreement with PTW.

## **§ 12 Obligations in case of termination**

- (1) In all cases of termination of the right of use according to § 3 (e.g. by withdrawal), the Licensee shall immediately surrender all deliveries of the contractual objects and delete all copies unless he is legally obliged to keep them for a longer period of time. The Licensee assures PTW in writing of the completion of the order.
- (2) The parties surrender all confidential information of the other party unless they are legally obliged to keep one copy of materials.

## **§ 13 Amendment clause**

- (1)** The parties agree that PTW is entitled to make changes to the conditions of this agreement. However, PTW will only make these changes for valid reasons, in particular due to new technical developments, changes in jurisdiction or other equivalent reasons.
- (2)** If the contractual balance between the parties is significantly disturbed by the change, the change shall not be made. Otherwise, changes require the consent of the Licensee.
- (3)** PTW will immediately inform the Licensee about the occurrence of any reason according to § 13 (1). Furthermore, PTW will inform the Licensee that in case no contradiction is made within two weeks after this information the new agreement shall apply between the parties.

## **§ 14 Final Provisions**

- (1)** Unwritten or written subsidiary agreements or arrangements do not exist. Amendments or additions to this Agreement must be made in writing to be effective. This shall also apply to amendments of this written form requirement. This shall not apply for individual agreements made by the parties after conclusion of this Agreement.
- (2)** This Agreement shall be governed by the laws of the Federal Republic of Germany with exclusion of the UN Sales Convention (United Nations Convention on Contracts for the International Sale of Goods dated 11.4.1980).
- (3)** The courts for PTW's registered office shall have exclusive jurisdiction over all disputes under and in connection with this Agreement, provided that Licensee is a merchant within the meaning of the Handelsgesetzbuch (German Commercial Code) or if upon the commencement of legal proceedings, Licensee has no place of business or ordinary residence in the Federal Republic of Germany.
- (4)** Should any provision of this Agreement be or become invalid, this shall not affect the validity of the remaining terms. The parties shall in such an event be obliged to cooperate in the creation of terms which achieve such legally valid result as comes closest commercially to that of the invalid provision. The above shall apply accordingly to the closing of any gaps in the Agreement.